

COMMENT TO THE MOOT COURT PROGRAM

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I acted as a technical expert in the mock United States patent infringement jury trial. In the United States the seventh amendment of the constitution which dates from 1791 requires that trial by jury at common law must be preserved. Since questions of fact that relate to issues of patent infringement were decided by juries in England in 1791, whether it makes sense or not, in the United States juries must decide factual questions relating to patent infringement. Therefore, I decided that creating a fictional background including receiving a Nobel prize would cause the jury to pay serious attention to my technical opinions regardless of their inherent strength. Thus, in my direct testimony I emphasized my professional background included my Nobel Prize as well as presented my technical opinion on the critical issue before the jury.

Everyone should understand that in the United States witnesses are prepared by the attorneys who put them on the witness stand. This is not the case in all common law countries, but it is characteristic of litigation in the United States. I was thus extensively prepared both for my direct examination as well as for the cross-examination. Since I have testified as an expert witness on patent office practice in nearly 100 cases, I was familiar with expert witness practice and familiar with strategies used by opposing attorneys during cross-examination. I understood that the questions during cross-examination would probably be designed to make me look bad before the jury even on points that were irrelevant to the merits of the case. I believe my guess was correct in that it appeared to me that the cross-examiner was determined to destroy my credibility on marginal issues. I leave it to those who view the video to determine whether the attempt was successful.

Students should study the procedure for dealing with patent infringement cases by the Patents Court in the U.K. and compare it to American practice. In the U.K. there is no jury in patent cases. Juries have not been used in such cases for over 100 years. Technical experts put their direct testimony in writing and then go on the witness stand only for cross-examination based on the written statement. This procedure saves a good deal of time and probably leads to more precise technical testimony. Students can see how the judges use this testimony by reading patent opinions from the U.K. This procedure can only be used in the United States in cases where neither party seeks to have the case decided by a jury.

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